No. 15,870

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT.

L. D. REEDER CONTRACTORS OF ARIZONA, an Arizona corporation,

Appellant,

versus

HIGGINS INDUSTRIES, INC., a Louisiana corporation,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF ON BEHALF OF APPELLEE.

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MAY IT PLEASE THE COURT:

We believe that the facts of this case should be some what amplified over the statement in appellant's brief. The petition specifically alleges that the Rental Development Corporation of America, an Arizona corporation, entered into a contract with the Rubenstein Construction Company, an Arizona corporation, to act as general contractors to erect a rental project near Arizona. It is further alleged that Higgins Industries, Inc. contacted the owner and ar-

chitect of the said development project. There is no statement in Articles 6 or 7 of the petition to the effect that anyone was solicited for sales of this particular block in California. This particular block actually was delivered in Arizona. We reiterate the building project was in Arizona; the appellant is an Arizona corporation and the block was not delivered in California. These facts were not changed by the affidavits offered by the appellant.

Affidavits were filed by appellee to the effect that Higgins Industries, Inc. did no business in California; that it was engaged in interstate commerce; that it had no paid representatives whatever in the State of California; that it did not regularly and systematically solicit orders in California; that any and all goods shipped to California were goods in interstate commerce; that it had no brokers soliciting orders, nor did it have any office, sample room or any person regularly employed to give advice to users of Higgins block flooring or to adjust claims in the State of California. The flooring block was not sold to L. D. Reeder but was sold to the McCauley Lumber & Flooring Company who sold to L. D. Reeder. The merchandise at the time of the supposed sale to L. D. Reeder was not in California so title did not pass in California but was being shipped to L. D. Reeder, an Arizona corporation, in Arizona.

Higgins Industries, Inc.'s motion to dismiss was based upon the fact that it was at no time doing business in the State of California other than selling

flooring in interstate commerce; that all sales were completed within the State of Louisiana, and that under California law it is not amenable to suit in California, but that, under the circumstances, even if California law allowed suit in the State of California, such statute would be unconstitutional; further the federal district court did not have jurisdiction because of improper venue.

ARGUMENT.

The undisputed and uncontroverted fact is that there was no privity of contract between appellant and the appellee. The affidavit of William S. Reeder, R. 64, is to this effect:

> "That L. D. Reeder Contractors of Arizona, through its purchasing and production manager, purchased the wood block flooring involved in this action from McCauley Lumber and Flooring Company at Los Angeles, California * * *."

There can be no dispute but that L. D. Reeder was an Arizona corporation, and that there were other companies in existence, namely, L. D. Reeder of Los Angeles, L. D. Reeder of Sacramento, L. D. Reeder of Portland. There can be no controversy as to the fact that the appellant was doing business in the State of Washington as well as Arizona, so that this is not the case of an individual plaintiff domiciled and residing in a state who is bringing a suit at his place of domicile against a corporation with whom he has entered into a contract or is the purchaser and owner

of a piece of machinery, equipment or device which was being used in the State of California and which caused the damage in the State of California. This case is different from any case that we have read for that reason.

The appellant lays stress on the fact that officers of Higgins Industries, Inc. made at least three visits to California in recent years. Appellee wishes to point out that these visits were made over a four year period. The fact is that none of the company's three salesmen were assigned to California; that the President, Frank O. Higgins, had never been in California to solicit orders, and that Roland C. Higgins and Edwin P. Crozat had been there respectively twice and once, but that all was at the time of the inception of the company. Higgins Industries, Inc. was incorporated in 1954.

The appellant further states that certain facts are undisputed but the appellee specifically states that the facts set forth on page 3 of the brief under section B, subsections 1 and 2, are not accurate statements and are not admitted. It is submitted that these allegations would leave the impression that this was a continuous policy. It is not and as a matter of fact the only time this was done at all, if then, was at the inception of the company. It is further submitted that in view of the findings of the judge these facts as set forth by Higgins must be accepted as proven. The affidavits of the officers of Higgins Industries, Inc. show that this was never done in California by anyone

living in California or representing Higgins there. The distributors have never settled complaints for Higgins' benefit but only for their own benefit since they sold the blocks. Under the facts Higgins must have told them that if they settled with the ultimate purchaser that then an allowance would be made to them.

III.

There is no personal jurisdiction over a foreign corporation where it is neither licensed to do nor is doing business within a state. Such foreign corporation is not amenable to service of process. In the absence of consent, service of process upon a foreign corporation in an action in personam is invalid under the due process clause of the United States Constitution, Amendment 14, 1, unless the corporation is "doing business" in the jurisdiction where the action is filed.

Dismanta v. Nehi Corporation, 171 Fed. 2d. 696.

International Shoe Co. v. Washington, 326 U. S. 210; 66 Supreme Court 154; 90 Law Ed. 95.

Travelers Health Association v. Commonwealth of Virginia, 339 U. S. 643; 70 Supreme Court 927; 94 Law Ed. 1154.

Boston Packaging Machinery Co. v. Woodman Company, 125 Fed. Supp. 567.

Perkins v. Louisville and M. R. Co., 94 Fed. Supp. 946.

West Publishing Co. v. Superior Court, 20 Cal. 2d 720, 726-7.

HIGGINS INDUSTRIES, INC., DOES NOT DO BUSINESS WITHIN THE STATE OF CALIFORNIA SUFFICIENT TO MAKE IT AMENABLE TO SUIT THEREIN.

This question resolves itself into two parts; first, is Higgins Industries, Inc., doing business sufficiently to bring it within the statute of California, and, secondly, if so, would such a suit violate the Constitution of the United States? A discussion of these questions is to be found in the case of *Pulson v. American Rolling Mill Co.*, 170 Fed. 2d 193, decided by the Court of Appeals for the First Circuit. In this case the Court says:

> "This case is brought solely on diversity grounds in a federal court sitting in Massachusetts. Rule 4(d) and (7) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that service on a foreign corporation is valid if made in the manner prescribed by any statute of the United States or in any manner prescribed by the law of the state in which service is being made. There being no federal statute applicable, and service having been attempted under Massachusetts procedure, the case is governed by the requirements of valid service in that state."

There are two parts to the question of whether a foreign corporation can be held subject to suit within the state. The first is a question of state law. Has the state provided for bringing the foreign corporation into the courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it

so chooses is a matter for the law of the state as enacted by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise as to whether such attempts violate the due process clause of the interstate commerce clause of the Federal Constitution. This is a federal question, and, of course, the state authorities are not controlling, but it is a question which is not reached for decision until it is found that the state statute is broad enough to assert jurisdiction over the defendant in a particular situation. The Court in the above cited case then went on to hold that under the state law of Massachusetts the courts have limited it not to cover the case of a foreign corporation which is engaged solely in solicitation of interstate commerce within the state.

The first question, therefore, to be determined is whether under California law the defendant corporation is doing sufficient business to allow it to be sued there. It is submitted that under the statutes and decisions of the State of California it is not subject to suit in California. We think that a determination of the California law on this question has been made by the United States District Courts of California in the following cases:

Moore Machinery Co. v. Stewart Warner Corp., 27 Fed. Supp. 526, and

Perkins v. Louisville & N. R. Co., 94 Fed. Supp. 946. In that recent case the Court said:

> "The California courts have had numerous occasions to pass upon the question now before us. It has been said that to be doing business in California in a jurisdictional sense, a foreign corporation must transact in this state some substantial part of its ordinary business through its agents or officers selected for that purpose. *Jameson v. Simonds Saw Co.*, 1906, 2 Cal. App. 582, 84 P. 289; *Milbank v. Standard Motor Const. Co.*, 1933, 132 Cal. App. 67, 22 P. 2d 271; *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 1920, 183 Cal. 709, 192 P. 526; *Davenport v. Superior Court*, 1920, 183 Cal. 506, 191 P. 911. A California Court has recently held that a foreign manufacturing corporation was present within the state through the activities of its distributors who acted as agents although not intended to be such. *Thew Shovel Co. v. Superior Court*, 1939, 35 Cal. App. 2d 183, 95 P. 2d 149. See also *West Pub. Co. v. Superior Court*, 1942, 20 Cal. 2d 720, 128 P. 2d 777.
>
> "From these cases it is apparent that California courts take a broad view of the concept of doing business by a foreign corporation, and although no California case has been found which involved mere solicitation, it is the view of this court that under California law the continued solicitation of business by a foreign corporation maintaining a regular office within this state constitutes doing business and renders the foreign corporation present in the State of California and amenable to its process."

The first case held that there must be something more than mere solicitation by a representative of the defendant. The judge in the *Moore* case said that the California law was similar to the decisions of the federal courts on the subject.

We know of no federal court ruling which has ever held that a corporation conducting its selling in the manner that this one does is doing business with the state.

The Eighth Circuit Court of Appeals held in *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, F. 1, that a foreign corporation having no warehouse, office or place of business and which neither incurs nor pays any of the expenses of receiving, handling, storing or selling its goods in the state to which it consigns them to a factor who conducts all the business and assumes and pays all expenses incurred in the latter state is not doing business there within the true meaning of the statute relative to the admission of a foreign corporation. Other cases to the same effect are:

Kelley v. Delaware L. & W. R. Co., 170 Fed. 2d 195;
Mueller Brass Co. v. Alexander Milburn Co., 152 Fed. 2d 142; and
Frene v. Louisville Cement Co., 134 Fed. 2d 511.

To hold that Higgins Industries, Inc., is doing business within the State would violate the Constitution of the United States:

If the California court interpreted its statutes, so as to hold that appellee was doing business in California, it would be violative of the Constitution of the United States. The appellant admits that prior to the decision of *McGee vs. International Life Insurance Co.*, 78 S. Ct. 199, 2 L.Ed. 223, decisions of the Federal courts deny the right of California to hold that Higgins is amenable to suit there. It is our opinion that the appellant has placed a completely improper emphasis on this decision. In order to understand this decision, however, the prior decisions must be studied and understood. We will first show conclusively that under these decisions and under the *International Shoe Company vs. State of Washington*, 326 U.S. 310, 66 Sup. Ct. 154, this corporation is not amenable to suit in the State of California, that the lower court was correct in its decision. The *McGee* case will then be discussed and analyzed.

The case that has gone further in allowing a corporation to be sued in a state without violating the Federal Constitution is the case of *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 Sup. Ct. 154. The question presented here was whether or not the Supreme Court of Washington in holding that suit was authorized under the facts as hereafter given was violating the Constitution of the United States. This case arose in the state courts of Washington and reached the Supreme Court of the United States by reason of a writ of certiorari. The Court in this case

held that there must be such activity as would manifest the presence of the corporation in the state. This activity was defined as a continuity of solicitation by agents of the defendant. This solicitation must be continuous and systematic. There were some eleven salesmen paid by the defendant corporation who continuously solicited business in the State of Washington. It was true that the corporation entered into its sales contracts outside the state and had no salesroom, office, showroom, bank accounts, etc., within the state. However, and the Supreme Court emphasizes that the solicitation activities of the corporation were not only continuous and systematic *but gave rise to the liability sued upon.* The case at bar does not meet this test. This case, therefore, is of such a nature that it would be unconstitutional to hold that Higgins was doing business within the state.

Robert M. Green v. Chicago, Burlington & Quincy Railway Co., 27 Sup. Ct. 595, 205 U. S. 530, 51 L. Ed. 916;

Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct.;

International Harvester Co. v. Kentucky,, 234 U. S. 589, 34 Sup. Ct. 946; 58 L.Ed. 479.

It is submitted that none of the cases either before or after this Supreme Court decision give any sustenance to appellee's position that the appellee Higgins Industries, Inc., is doing business within the state. *Frene v. Louisville Cement Co.,, supra,* which was the forerunner of the doctrine enunciated in the *International Shoe Co. v. State of Washington* case, *supra,*

required a regular and continuous course of solicitation by employees of the defendant, plus the fact that their activities in the state give *rise to the cause of action.*

There are many cases which hold that a corporation doing much more than the appellee was not doing business within the state.

> *Owens Illinois Glass Co. v. District of Columbia, 204 Fed. 2d 29;*
> *Mueller Brass Co. v. Alexander Milburn Co., supra.*

Rendleman v. Niagara Sprayer Co., supra, wherein it was said "local dealers purchasing goods from foreign corporation and reselling them in due process of business held not agents on whom process against corporation could be served". On the other hand, one employed by the defendant, a foreign manufacturing corporation, and designated service manager in charge of sales and services in a designated territory not a part of Illinois held an agent of defendant upon whom service might lawfully be made.

The Supreme Court once again in the case of *United States v. Scophony,* 68 Sup. Ct. 855, 333 U.S. 795, decided after the *International Shoe Co.* case, still approved the case of *Frene v. Louisville Cement Co., supra,* and said:

> "Thus, by substituting practical, business conceptions for the previous hair-splitting legal tech-

> nicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. * * * A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even retreating to its headquarters defeat or delay the retribution due."

There can be no doubt but that the Court still holds to the doctrine that mere solicitation, unless it is continued and according to a plan, is not doing business in a state. The Court says:

> "Scophony's operations in New York were a continuous course of business before and throughout the period in question here. They consisted in strenuous efforts not simply to save an American 'investment' but to salvage and resuscitate Scophony's whole enterprise from the disasters brought upon it by the war."

We challenge the appellant to produce any case which has held that it is constitutional to hold that a company was doing business which:

1. had no employees or agents regularly and systematically soliciting orders in the state;

2. had no offices, showrooms, sample rooms, bank accounts, paid agents living in the state, no officers of the company living in the state;

3. Which did not deliver the goods in question into the state.

Also, in examining any authority, it must be taken into consideration that the appellant was not domiciled in the state; that the goods were used in a state other than California, and the cause of action arose outside of California.

In concluding this part of the brief, the Court's attention is called to the case of *Elliott & Sons Co. v. King & Co.*, 144 Fed. Supp. 401. This case contains a very fine discussion of the whole problem and thoroughly upholds our contention that California is not the proper place for a suit against Higgins Industries, Inc.

IV.

The burden of proof is upon the plaintiff to establish that Appellee Higgins Industries, Inc. is doing business in California to an extent sufficient to make such foreign corporation amenable to service of process.

Proctor and Schwartz v. Superior Court, 99 Cal. App. 2d 376, 379;
Martin Bros. Electric Company v. Superior Court, 121 Cal. App. 2d 790, 794;
Smith and Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673, 676.

V.

It is submitted that the ultimate issue is whether the appellee is doing business within the State of California; not whether California is a proper forum on the theory of balancing convenience and justice. It

is submitted that this should and is the issue, although the appellant argues that the case of *McGee vs. International Life Insurance Co.*, 78 Sup. Ct. 199, 2 L. Ed. 223, decided by the Supreme Court of the United States, and *Henry R. Jahn & Sons vs. Superior Court*, 49 A.C. 881, decided by the Supreme Court of California, have changed the law so that the ultimate issue is solely one of balancing convenience and justice.

In *Smith and Wesson, Inc. v. Municipal Court*, 136 Cal. App. 2d 673, the Court states at page 678: "As indicated in that case (*Martin Bros. Electric Co. v. Superior Court, supra)* the question of the balance of convenience and justice is not the ultimate question to determine but it must be supported by competent evidence that the corporation is doing business within this state as contemplated by law."

In *Martin Bros. Electric Co. v. Superior Court*, just as in *Smith and Wesson, Inc., v. Municipal Court*, articles manufactured by the defendant in a foreign state were sold and used in California and the plaintiff was a California resident who was injured in California. After holding that the existence of a California wholesaler who dealt in defendant's products did not establish that defendant was doing business in California, the court said at pages 793-4:

> "Respondent relies heavily upon the holding in the Fielding case that, 'In the final analysis it would seem that this is really not a question of the power of the state, but whether there is af-

forded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere. (See 20 C.J.S. 148; *International Shoe Co. v. Washington,* 326 U.S. 310 (66 S Ct. 154, 90 L.Ed 95, 161 A.L.R. 1057).)'

"Such a statement does not imply that a court may, without supporting evidence, exercise its absolute discretion and apply its own ideas of justice and equity in the determination of such questions. Where a defendant properly moves to quash service of summons and the evidence presented is conflicting, the burden of proof is on the plaintiff to produce evidence from which the court can determine which course is just and equitable to both parties. *(Briggs v. Superior Court,* 81 Cal. App. 2d 270 (183 P. 2d 758); *Jameson v. Simonds Saw Co.,* 2 Cal. App. 582 (84 P. 289).) The facts adduced at the hearing of the motion in this case are not sufficient to make petitioner amenable to the process of the courts of this state"

(The facts so adduced by the plaintiff were that she was injured in California and that defendant's machines were sold at wholesale by Reid and Sibell, a San Francisco concern.)

We think that the reasoning of Judge Grim in the case of *Florio v. Powder-Power Tool Corp.,* 148 Fed. Supp. 843, is a good example of what is meant by doing business so as to meet venue requirements. He quotes from the Restatement of the Law of Conflict of Law. He said: "In explaining and amplifying its definition the Restatement gives an illustration (Re-

statement Conflict of Laws, Sec. 167, Illus. 3). " 'A incorporated in state X, manufactures automobiles and ships them to a dealer in state Y, giving to dealer exclusive territory, with power to A to inspect the dealer's stocks and accounts. The dealer agrees to charge only certain prices and to maintain a supply of repair parts. A is not doing business in Y.' "

It is submitted that this destroys any argument that it is not necessary that the corporation be held to be doing business before the question of convenience is discussed.

The next question which must be discussed is whether the *McGee* case and the *Jahn* case change in any way this accepted rule of law.

In the *McGee* case a life insurance company sold policies by mail to policyholders within the State of California. The law of California made the insurance company amenable to suit at the instance of the policyholder in that state. The Supreme Court held this did not violate the due process clause. There are great distinctions between this case and the case at bar. In the first place the regulation of life insurance has always been held by the Supreme Court to be in the states. Further this business is clothed with a public interest and is thoroughly regulated by law. In this particular case the appellant is a resident of the State of Arizona. The only resident here involved in the State of California is the defendant, McCauley Lumber & Flooring Company. Great emphasis was

given to the fact that the contract was delivered in California. In our case at bar the flooring was delivered in Arizona. The court further says when claims are small or moderate in amount an individual claimant frequently could not afford the cost of bringing an action in a foreign forum, thus in effect making the company judgment proof although the insurance is sold for the purpose of paying claims. The whole purpose of the insurance can be defeated if small policyholders must sue in a foreign state. Furthermore, all the laws of the forum regulating insurance can be avoided by such procedure.

The equities in this case are all on Higgins' side. What the court has done in the *McGee* case is to balance the interest of the individual policyholder, the hardships which are placed upon him against the hardships placed upon an insurance company selling small policies to individuals. None of this is applicable to the case at bar.

Higgins does not sell to homeowners. Higgins sells to large contractors. L. D. Reeder is a large contractor domiciled in Arizona with an office in California and several other states. Higgins will be materially injured if it is forced to defend suits in every state of the union where its flooring is used. Particularly is this true when the appellee sells to a distributor who in turn sells the flooring. The floors are laid by another contractor. The only liability of Higgins is for defective flooring.

There is no reason analogous to that of allowing a small policyholder to sue a foreign life insurance company in California for holding that a manufacturer who sells his articles to distributors in interstate commerce in the 48 states should be forced to defend suits in any and all of these states merely for the convenience of large contractors or distributors. This would create a burden on interstate commerce. There can be no doubt but that under any definition Higgins is not doing business in California. If it is doing business in California, then it is doing business in every state in the union where it ships to a contractor or a distributor f.o.b. New Orleans. To allow a recovery in this case under the facts will be a great departure from the past and will wreck the interstate commerce clause. To carry the argument one step further, it would become apparent that anyone manufacturing goods, automobiles, manufacturers, boat manufactures, could be sued in any state where the products eventually were used. Higgins does not do business, the affidavits will show, any differently from any other manufacturing plant which is distributing its products. It does not have a patented process; it does not have a process that requires any help from Higgins in laying; it just sells block flooring in interstate commerce to distributors like McCauley. It is submitted that appellee has shown conclusively that the appellee is not doing business in the State of California. Under no decision cited by the appellant can it possibly be held that appellee is doing anything other than business in interstate commerce.

It is further submitted that under no decision cited can it be held to be amenable to suit in California under any recognized concept of law. However, the appellant claims that a new rule of law has been enunciated in the recent cases of *Henry A. Jahn & Son, Inc. vs. Superior Court,* 49 A.C. 881 and *McGee vs. International Life Insurance Company.* The first case was decided by the Supreme Court of California and the second by the United States Supreme Court. It is submitted that these cases in no way change the general rule of law as to what is necessary to make an ordinary corporation amenable to suit in a foreign state. However, for the purpose of argument, assuming that the law now is that the court, if the defendant has any contact with the state although not doing business therein must balance the hardship between the suing plaintiff and the defendant to determine whether or not the due process clause of the United States Constitution is violated. The determinative factor then is a balancing of the interest between the plaintiff and the defendant. *However, a court can only balance this interest if the plaintiff is a resident of the state where the suit is brought.* The very basis of the doctrine is that a defendant by having contact with the citizen of a state or by selling in interstate commerce into the state gives that state an interest in protecting the rights of *its* citizen. This alleged doctrine is not applicable to the case at bar, because the appellant is a foreign corporation to the State of California. The contract was for delivery of flooring in Arizona for a building project in Arizona. The cause

of action arose in Arizona where the appellant is domiciled.

In all of the cases cited by the appellant in its brief, except one, suit was brought by a resident of the State of California. The one case where suit was allowed by a resident of a foreign state was *McClanahan vs. Trans-America Ins. Co.*, 149 Cal. App. 2d 171; 307 P. 2d 1023. However, in that case there can be no doubt but that the Trans-America Insurance Company was actually and literally doing business within the State of California. That case is not any authority whatsoever for the appellant's position in this case.

In the *Jahn* case, *supra,* the plaintiff, a resident of California, sued the defendant who regularly purchased goods in the state, the whole contract between the parties being made in and arising in the State of California. It is to be particularly noted that the court squarely lays the basis of its decision upon the *International Shoe Company* case *supra.* This disposes of the case but the appellant still argues that the ratio decidendi of the case is that there would have been a hardship on the plaintiff if the defendant had not been deemed present in the state. The appellant relies upon the language, we presume.

> "There is no constitutional requirement that this hardship has to be invariably borne by the plaintiff whenever the defendant is not deemed present in the state of the plaintiff's residence."

It is admitted that this language goes further than the question of the defendant's doing business in the state, but it equally demands that the state applying this theory be the state of the plaintiff's residence.

A reading of the *McGee* case, *supra,* shows clearly that its doctrine is only applicable to residents. The Court said:

> "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay the claim."

The *McGee* case, of course, is an unusual case in that it deals with insurance which is strictly regulated. This has been discussed previously, but the Court's attention is again called to this fact.

In the case at bar the appellant corporation was organized and exists under the laws of the State of Arizona. It did not purchase the goods in question from the appellee but from the McCauley Lumber & Flooring Company. The goods were shipped f.o.b. New Orleans to Phoenix, Arizona—never were within the State of California and were to be used in California. The affidavits submitted by the appellant show that the Arizona corporation was one of a group of corporations. One company is a Washington company, the others were described as L. D. Reeder Company of Sacramento, L. D. Reeder Company of Los Angeles and L. D. Reeder Company of Portland, Oregon. Un-

der these circumstances, it must be presumed that the appellant had either a financial or tax reason for having the purchase made by an Arizona corporation instead of a California corporation. It is inconceivable, under these circumstances, that any such doctrine as contended for by the appellant can be applied in order to protect a non-resident corporation. Furthermore, the *McGee* case, as are the other California cases cited, is based upon claims by individual plaintiffs who would suffer undue hardship by having to sue in a foreign jurisdiction. This does not apply to corporations doing business in various states.

Under these circumstances there can be no jurisdiction sufficient to allow a foreign defendant engaged in interstate commerce to defend a suit in California when (1) there was no privity of contract between it and the plaintiff; (2) the contract was not performed in California and the cause of action arose in the domicile of the plaintiff corporation, and (3) the plaintiff corporation is not a resident of California and the only contact that the State of California had with the matter was that this foreign corporation had a joint office with several domestic corporations and other foreign corporations in the State of California and entered into a contract with still another corporation who was not an agent of the appellee.

To allow suit in this matter would mean that corporations having offices in many states could elect the jurisdiction to sue any defendant corporation who

did business in interstate commerce. In other words, Higgins Industries, under the doctrine would be subject to suit by any building contractor or wholesaler of products in any state where corporations did business, although it was not domiciled there and although Higgins merely sold in interstate commerce. This would most certainly create a burden on interstate commerce. If the doctrine is applied in this case then there is no such thing as interstate commerce and any corporation selling merchandise for use in a state will be subject to suit in that state regardless of whether the cause of action arose in the state or not.

It is, therefore, submitted that under no rule of law and under no decision is Higgins Industries, Inc. amenable to suit in the State of California.

VENUE.

However, even if the law does reach the point where the appellee could be sued in California in this particular case it would be based not upon the fact that Higgins was doing business but that the State of California by reason of the residence of the appellant there and some contact of Higgins with the state would allow suit without violating the due process clause. Such a rule of law would be of no help to the appellant in this case. If jurisdiction were allowed on this basis the appellee still could not be sued in the Federal Court in California because of the venue provisions.

Since this suit is based upon diversity of citizenship insofar as venue is concerned, the suit must be brought either at the residence of the appellant or of the appellee.

VI.

For venue purposes a corporation must be sued in the judicial district in which it is incorporated or licensed to do business or is doing business.

Section 1391, Title 28, U.S.C.A.

The question of doing business so as to determine whether the venue is proper must be determined under the law of the federal courts.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L.Ed. 964;
So. Pacific Co. v. Denton, 146 U.S. 202, 13 Sup. Ct. 44, 36 L.Ed. 942;
Goldey v. Morning News, 156 U.S. 518, 15 Sup. Ct. 559, 39 L.Ed. 517;
Mechanical Appliance Co. v. Castleman, 215 U.S. 518, 30 Sup. Ct. 125, 54 L. Ed. 272;
Cain v. Publishing Co., 232 U.S. 124, 34 Sup. Ct. 284, 59 L. Ed. 534.

The cases that have been previously cited show conclusively that no federal court has ever held that a corporation which had no activities whatsoever in the state was doing business there.

The appellant is not a resident of California. The rule has been and still is that a corporation is a resident in the state where it is incorporated and domiciled. See Encyclopedia of Federal Procedure, Vol. 3, Section 4.13, Page 29, where it is said:

> "But it long became the settled law that, for purposes of suit, a corporation created by a state was, although an artificial person, to be considered as a citizen of that state, and that there was a conclusive presumption of law that the persons composing it were citizens of the same state. It was considered manifest, therefore, that the venue of a suit by or against a corporate party was controlled by the same general statutory rules applicable to natural persons, subject only to such qualifications as necessarily result from the artificiality of the corporate being. Insofar as citizenship, as distinguished from residence or inhabitancy, was a factor in determining the place for suit, it became the established rule that a corporation created by a state was a citizen of the state of its creation. Likewise, the rule became equally well settled that such a corporation was a resident and inhabitant of the state which gave it being, and in the case of multiple incorporation, in each state which gave it being."

The appellant, therefore, is clearly a citizen and resident of the State of Arizona and cannot bring a suit in California unless the defendant is a resident of California, or unless it is a foreign corporation doing business in California. For venue purposes the defendant, as is shown by Section 1391 of Title 28,

U.S.C.A., may be sued in a district in which it is doing business. Otherwise, it is not a resident of California.

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CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel this .... day of July, 1958.

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